PUBLIC PROSECUTOR

v.

MOHAMMAD BIN AMBUNANI

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL TRIAL NO. T (47) 23 OF 1993]
7 OCTOBER 1994

DANGEROUS DRUGS: Charge of trafficking in 1,669.2 grammes cannabis - Cannabis discovered in bag carried by accused - Prosecution relying on the statutory presumptions of knowledge and trafficking - Chemist giving evidence that he tested samples of the plant material weighing 184 grammes - Whether adequate representation of the whole - Whether presumption of trafficking can be invoked.

The accused was charged with trafficking in 1,669 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The accused was apprehended as a result of an ambush and the cannabis was recovered from a bag carried by the accused. The Government Chemist gave evidence that he had taken samples weighing 184 grammes, of the 1,669 grammes, for analysis and confirmed that the substance tested was cannabis within the meaning of s. 2 of the Act.

The prosecution sought to rely on the statutory presumptions of knowledge and trafficking under ss. 37(d) and 37(da)(vi) of the Act and the question that arose was whether the said presumptions could in fact be invoked.

Held:

[1] The evidence of the prosecution witnesses had proved beyond reasonable doubt that the accused was in possession of the bag which would invoke the presumption that the accused knew that the bag he was in possession of contained cannabis. Although it was true that learned Counsel for the accused had put it to the witnesses that the accused was not carrying the bag, assertions made by Counsel on behalf of the accused and put to witnesses for the prosecution cannot constitute evidence and are therefore incapable of creating any doubt in the case for the prosecution nor can it stand in the way of the invocation of the presumption of knowledge.

[2] In deciding whether the samples of plant material upon which the chemist had carried out the chemical tests were adequate having regard to the total weight of the plant material, the Court was dealing with a matter which is measurable. The most adequate quantity, is without doubt, an amount which is not less than 200 grammes, that being the quantity required for invoking the presumption of trafficking.

[3] In the present case, the quantity upon which the chemical tests were conducted was only 184 grammes, which was 16 grammes short of the 200 grammes required by s. 37(da)(vi) of the Act. No explanation was given why chemical tests were not conducted on 200 grammes of the plant material when there was more than sufficient quantity of the plant material, 1669.2 grammes to

be exact, available. Chemical tests on 200 grammes of the plant material would have been the best evidence available in this case but yet it was not procured.

[4] Knowledge and trafficking are already to be presumed in a dangerous drugs case. There was no reason why the evidence for establishing that 200 grammes of the plant material was cannabis was established by probative evidence through the examination of a part, not exceeding 200 grammes, of the plant material, when it can be ascertained beyond reasonable doubt by the examination and the conduct of chemical testing on 200 or more grammes of the plant material.

[5] In the circumstances of the case, the presumption of trafficking had not arisen because the 200 grammes of cannabis had not been established beyond reasonable doubt. Accordingly, the charge against the accused should be amended to one of possession of 184 grammes of cannabis under s. 6 read with s. 39A(2) of the Act.

[Accused pleaded guilty to charge of possession. Sentenced to life imprisonment and 10 strokes of the whip. Cannabis and plant material seized ordered to be destroyed].

Cases referred to:
PP v. Amir bin Dupa, High Court Tawau, Criminal Trial No. T(41) 6 of 1994 (unreported) ***(foll)***
Roslin b Harun v. PP [1994] 2 AMR 20:1040 SC / [1994] 2 CLJ 486 ***(refd)***
Leong Bon Huat v. PP [1993] 2 AMR 37:2132 / [1993] 3 CLJ 603 ***(foll)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 FC ***(refd)***
PP v. Muhamed bin Sulaiman [1982] 2 MLJ 320 FC / [1982] CLJ 540 ***(refd)***

Legislation referred to:
Dangerous Drugs Act, 1952, ss. 2, 6, 37(d), 37(da)(vi), 39 A(2), 39 B(1)(a), 39 B(2)

JUDGMENT

Ian H. C. Chin J:
Introduction

Again, like many other cases already tried before this Court, it is drug trafficking charge involving a Filipino Suluk who has no document of identification and, as is invariably the case, no document of travel. Such is the liberty of foreigners in the State of Sabah that not only do they enter Sabah as and when they like but they carry out nefarious activities which poison the body and weaken the soul of our citizens. One of such activities is peddling. When they do carry out harmless activities, like hawking, they do so without the necessary licence and without paying taxes. Worse still, they do so not only in complete defiance of the laws but they kill enforcement officers as well who carried out their duty of preventing illegal hawking as happened to an enforcement officer in Tawau and, as reported very recently in a newspaper, injured enforcement officers in Kota Kinabalu who had to beat a hasty retreat after being set upon by a whole gang of illegal hawkers. To that extent, there is anarchy. Enforcement of the law is very difficult when you do not or cannot control the movement of foreigners who enter our country illegally and this has the result that they roam the country to carry out activities in defiance of the law. It is so difficult to keep track of them. This leads me to the first of the problems of this case, the name of the accused. The requisition for this

case to be heard by this Court refers to the accused as "Mohamed bin Ambunani", the record of the remand proceedings of the lower Court refers to him as "Mohammad bin Ambunani" the abstract of police report says the accused's name is "Muhammad Bin Ambunani" while the charge before the Court says his name is "Muhammad bin Ambunani". In the end, I am of the view that it does not matter whatever his name is as long as the person who is alleged to have committed the offence is before the Court and the accused, who has either supplied or been given the various spellings of his name faces, the following charge, viz:-

> That you on the 19 February 1993, at about 7,55 pm at the carpark, Hotel Jagokota, Lahad Datu, in the District of Tawau, in the Sate of Sabah, did on your behalf traffic in dangerous drug to wit, 1,669.2 grammes of cannabis, and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act, 1952 (Revised 1983), Act 234 punishable under s. 39B(2) of the same Act.

(Actually, Lahad Datu is not in the District of Tawau, though the charge says otherwise).

The Evidence for the Prosecution

On 19 February 1993, Inspector Ahmad Fuad Othman ("Fuad") received information, including the description of the seller, that cannabis would be sold in front of Hotel Jagokota ("The hotel"), Lahad Datu, at about 8.00 pm that night. Fuad arranged an ambush party comprising himself and four other police officers, one of whom was corporal Terry bin Jimmy ("Terry"). The ambush party laid in wait when at about 7.55 pm the accused was seen, by Fuad and Terry, emerging alone from Kampung Puyut and walking in the direction of the car park of the hotel. They also saw that the accused carried a black plastic bag ("the bag") with his right hand and stopped at the car park of the hotel. Fuad rushed out of his ambush position and grabbed the accused with his hands from behind the accused. It was at this time that the bag fell to the ground. The bag was searched by Fuad in the presence of the accused and the other police officers. Fuad found 3 packages in the bag, one was newspaper wrapped and the other two were heavily cellotaped, all of which he found to contain dried leaves. Also found in the bag was a pencil-thin plastic contraption for weighing which when I examined it does not function as it was damaged and this is confirmed by the police report.

The accused and the bag, together with its contents, were taken to the police station in Lahad Datu, where the accused was put in the cell while the bag and contents ("the exhibits") were locked by Fuad in a steel cabinet in his office. He made a police report of the arrest and seizure of the dried leaves which he believed to be cannabis and ASP Lim Teck On ("Lim"), the head of the Tawau Police Anti-Narcotic Branch, was informed the same night. Lim came to Lahad Datu the afternoon of the next day, the 20 February 1993, and took possession of the exhibits, together with others which I will not advert to because they are not relevant to the present charge. Lim marked and registered all the exhibits. He thereafter wrapped and sealed the exhibits, excluding the said plastic weighing scale, ("the scale") for the purpose of sending them to the chemist. The package and the red weighing scale was then handed over to Salihin bin Yunos, the Lahad Datu police exhibit store keeper, for temporary safekeeping in the exhibit store until 21 February 1993 when Lim reclaimed the exhibits and took them to Tawau

where he kept them in the Tawau police exhibit store until the 26 February 1993 on which latter date Lim handed the package to Khalid Safan a senior government chemist, ("the chemist") in Kota Kinabalu for the purpose of having the dried leaves in the package (together with other dried leaves packed in another package which I have earlier said is not relevant to the present charge) examined and analysed. The package less the amount of samples, which I will later advert to, taken by the chemist for the purposes of his examination and analysis, was later returned, this time sealed with the seals of the Chemistry Department, to Lim on 9 June 1993. Lim kept the package until it was produced in Court on 5 October 1994.

The chemist had satisfactorily and fully accounted for the safe-keeping of the package. He also testified that the respective net weight of the plant material in the three packages in the bag were 83.45 grams, 716.85 grams and 869 grams, making a total of 1,669.2 grams. The total amount of samples he took from the three packages for conducting the microscopic examination, the Duquenois Levine test and the Thin Layer Chromatography test, were 184 grams. It was after the said three tests and after the 100% examination of the total amount of the plant material that the chemist came to the conclusion that the plant material was cannabis within the meaning of the Dangerous Drugs Act, 1952.

It was upon the evidence that I have set out that I have to decide whether the prosecution had made out a case for the accused to answer. The prosecution has to make out a case beyond any reasonable doubt. There were other very prejudicial evidence that were given in Court relating to the discovery of cannabis in a house which the accused took Fuad to on 20 February 1993 but which does not concern the present charge and this discovery came as a result of the interrogation of the accused. In the event I have to shut my mind totally to those evidence even though I have ruled them inadmissible because the evidence had already been given and recorded.

Whether Case Beyond Reasonable Doubt.

The first of the presumptions relied on by the prosecution is s. 37(d) of the Dangerous Drugs Act, 1952, which says:

> any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

This calls for consideration of whether the accused was found in custody or control of the bag which contained three packages which the chemist said were all cannabis. Fuad had testified, and supported by Terry, that he saw the accused carry the bag and the the accused was still carrying the bag when he was about to arrest him. The bag only fell from the accused's right hand after Fuad had grabbed the accused from behind the accused. Tough Terry testified that Fuad had only examined two of the packages and not three as testified by Fuad, such contradiction in the evidence does not in any way cast any doubt in the case of the prosecution that the accused was caught in manual possession of the bag containing the cannabis. Therefore, I am of the view that the prosecution had, at this stage, proved beyond any reasonable doubt that the accused was in possession of the bag which would invoke the presumption that the accused knew the

bag he was in possession of contained cannabis unless there are evidence at this stage to rebut that presumption or that are in the way of invoking the presumption. This leads me to consider whether there are such evidence.

Questions were put to Fuad and Terry by Miss Cecilia Pang, Counsel for the accused, that the accused was not carrying the bag which they denied. It was also put to Fuad that the accused had explained to him why the bag was found near the accused which Fuad also denied. Assertions made by Counsel on behalf of the accused and put to witnesses for the prosecution cannot constitute evidence. They are therefore incapable of creating any doubt in the case for the prosecution nor stand in the way of the invocation of the presumption of knowledge.

There is nothing by way of evidence, at this stage of the proceedings, to substantiate the allegations of the accused that he was not found in manual possession and that he had explained why he came to be standing, as alleged on his behalf by his Counsel, beside the bag.

As for the chain of evidence concerning the custody of the cannabis, the evidence of which I have already set out, I am of the view that it was not broken and the custody had been accounted for beyond any reasonable doubt. Though Fuad's evidence appear to contain contradictions as regards whether the four police officers who were members of the ambush team all, after the arrest of the accused, went back to the police station in Fuad's car or not but I accept his testimony that only two of the police officers together with the accused travelled in his car to the police station while the exhibits were placed in the front passenger seat of his car and with Fuad driving the car. In any event this does not cast any doubt as to the custody of the exhibits nor as to the accused being found in manual possession of the bag which contained cannabis.

What has finally to be considered is whether the other presumption, that of trafficking, laid down by s. 37(da)(vi) of the Dangerous Drugs Act, 1952, can be invoked. It will be recalled from the evidence that I have earlier set out that the total net weight of the plant material was 1,669.2 grams from which samples weighing 184 grams were taken and upon which the standard three tests were conducted. For the purpose of this exercise I will first remind myself of what I have said in the unreported case of *PP v. Amir bin Dupa* (High Court, Tawau, Criminal Trial No. T (41) 6 of 1994, 11 August 1994), the relevant part of my judgment I reproduce here, viz:

> It is against those evidence of the chemist which I just set out that I have to decide whether, to use the words of *Leong Bon Huat v. PP* [1993] 2 AMR 37:2132, at p. 2136, "the samples of plant material upon which the chemist had carried out the chemical tests, were adequate having regard to the total weight of the plant material". A recital in some detail of the judgment of *Leong Bon Huat v. PP* is necessary to see how the chemist in our case performed compared to the chemist in that case. The Supreme Court in that case, at p. 2135, has this to say:-
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> > It will be seen that he made no mention of the results of his physical examination; for example, he did not say that the plant material was all of the same type and physical features as that of cannabis, nor did he say what were the results of his microscopic examination. Did he notice any resin in the plant material? If so, in what quantity was it present? Nor did he tell the Court as to what were the tests he conducted using chemical methods; for example, did he resort to the Dequenois Levine test and/or the Thin Layer

Chromatography test? If so, what were the results of those tests?

I will pause here to say that the chemist in our case did all that was neglected by the chemist in that case as highlighted in the just quoted judgment. The judgment of the Supreme Court continues in the following terms:

> But, more importantly, under re-examination by the Deputy Public Prosecutor the chemist said this:
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> I did not obtain the weight of each sample taken out but the total weight of samples taken for analysis is more than 10% of the net weight of 793.85 gms.
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> And it was only in answer to the Court, at the end of his re-examination that he said:
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> The dried plant matter is cannabis as defined in s. 2 of the DDA Act 1952. I examined it in accordance with the definition in the DDA 1952.
>
> But the crucial point was whether the grounds upon which he arrived at the conclusion could withstand the test of strict curial scrutiny.
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> It is obvious that from the extracts of the testimony of the chemist, the following plain facts emerge:
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> First, the total weight of the plant material said to be cannabis was 793.85 grammes.
>
> Second, the total weight of the samples taken for analysis was "more than 10% of the net weight of 793.85 gms" of plant material.
>
> Third, the chemist did not take any sample from the balance of the plant material (which formed a very substantial part of the whole) for analysis.
>
> Now, what does "more than 10% of the net weight of 793.85 gms" mean? Does it mean 11% or 12% or 13% or more than that? Not to put too fine a point on it, the expression "more than 10%" is ambiguous and there should be no ambiguity on such a matter where the life of a subject is at stake. What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.
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> To take the point a little further, if by the expression "more than 10% of the net weight of 793.85" means a little more than 10% - and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning - then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more 79.30 gms of cannabis, which would be well below the statutory minimum of 200 grams of cannabis required for the operation of the presumption of trafficking under s. 37(da) of the Act.

Pausing again, I would remark that every criticism made there by the Supreme Court could aptly apply to our case. The only difference in the facts is that in our case the nett weight is 809 grams while in that case it is 793.85 grams but then it makes no difference because in both cases, "more than 10% of the net weight" would in any event be under 200 grams. Reverting again to the judgment, it continues in this way:

> It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of

probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act it was necessary to take matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity have involved, the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests, were adequate having regard to the total weight of the plant material, for the reasons stated.

It seems to me, from the said judgment of the Supreme Court, that the Court has, in each case, to decide what constitutes "adequate quantities" upon which tests must be conducted to determine beyond reasonable doubt whether a plant material is cannabis or not. As regards the quantity of samples in our case, the chemist evidence that he took more than 10% of the total weight of the plant material, is neither clear nor convincing and such inadequacy cannot be glossed over by the chemist's statement that in Malaysia, chemists always take more than 10% and that he had done so when the chemist did not even state unequivocally that he had weighed the samples though, I presume, the Court could be invited to assume that he had weighed them because he gave evidence that he "did not record the weight". But then again, the failure to record the weight could also be due to the failure to weigh them because the chemist did not explain why he did not record the weight and such failure could well be due to the fact that the samples were not weighed at all. In the end, I am left in doubt as to what quantity of samples had been tested and therefore I cannot conclude that the necessary tests had been conducted on an adequate quantity of samples to establish the minimum 200 grams necessary to invoke the presumption of trafficking. I have now to advert to *Roslim b. Harun v. PP* [1994] 2 AMR 20:1040 SC and the report of the same case of the High Court at [1993] 3 CLJ 505. at p. 513 which the learned deputy had cited and argued that the present case does not suffer any of the infirmities of *Leong Bon Huat v. PP* and therefore the chemist's evidence that the plant material weighing 809 grams was cannabis, even though the chemist did not state the exact quantity of samples taken, must be accepted. It must not be forgotten that though the chemist may be expert witnesses in the field in which he gave evidence, the Court must never abdicate its duty to "assess the evidence of the expert witness" (see *Wong Swee Chin v. PP* [1981] 1MLJ 212 FC) or abdicate its duty to determine the "weight or value" of the evidence (see *PP v. Muhamed bin Sulaiman* [1982] 2 MLJ 320 FC). As for *Roslim bin Harun v. PP*, the Supreme Court there, never said that it is a matter of no consequence that the weight of samples had not been established. It cannot be insignificant because the weight of the samples will provide a basis for a decision whether the samples taken are of an "adequate quantity" and which decision, according to *Leong Bon Huat v. PP*, the Court must take. It is doubtful whether the chemist in our case had weighed the samples. If he had not done so, it becomes questionable whether what samples he had taken can be said to be adequate and it is also questionable how the chemist can state that the samples were more than 10% of the plant material. The expression "representative samples" which the chemist used does not excuse the chemist from explaining, and he did not explain, what quantity or amount of samples are regarded as representative of the whole. I do not think the Court should, without more, accept bare expressions, such as "representative samples", as satisfying the "adequate quantity" test which the Supreme Court in *Leong Bon Huat's* case appears to me to have laid down. I am of the view that the prosecution had failed to establish beyond reasonable doubt that the 809 grams of plant material are cannabis. But, the prosecution has established

beyond reasonable doubt that the accused was in possession of approximately 80 grams of cannabis"

Here, as in the said unreported case which I have just referred to, I am faced with the issue, to quote, "whether the samples of plant material upon which the chemist had carried out the chemical tests, were adequate having regard to the total weight of the plant material". I am of the view that in deciding whether the "quantity" of the sample is adequate I am dealing with a matter which is measurable. The most adequate quantity is without doubt an amount which is not less than 200 grams that being the quantity required for invoking the presumption of trafficking. In this case, the quantity upon which the chemical tests were conducted was only 184 grams which was 16 grams short of the 200 grams required by s. 37(da)(vi) of the Dangerous Drugs Act, 1952. I fail to understand why the chemist did not conduct the chemical tests on 200 grams of the plant material when there is more than sufficient quantity of the plant material available, 1669.2 grams to be exact. No explanation is given why chemical tests were not conducted on 200 grams of the plant material when this could have been done. Chemical tests on 200 grams of the plant material would have been the best evidence available in this case but yet it was not procured. Mr. Zahir Hussein bin Ahmad Shah, the learned Deputy Public Prosecutor, had argued that the present case does not suffer any of the infirmities of the chemist's evidence in that case. He also argued that s. 37(j) of the Dangerous Drugs Act, 1952, lays down that 10% of the quantity of the plant material is sufficient and thus 184 grams of sample out of 1669.2 grams is more than 10%. It follows from his argument that if a chemist had done all the chemical tests and had physically examined all and determined the plant material to be of the same type with resins on them, it is then sufficient to conduct chemical tests on only 10% of the total quantity of the plant material whatever the quantity of the total. I do not share the same view. In the first place, s. 37(j) of the Dangerous Drugs Act, 1952, when it talks about "ten percentum", does not refer to the quantity of the substance but to the number of the receptacles holding the substance. It cannot therefore be true that if a chemist conducts chemical tests on a quantity of 10% of a total, that is sufficient or that satifies the test of "adequate quantity". If this is not so, I see no reason why the Supreme Court (as was then called) should, in *Leong Bon Huat v. PP*, state that what constitutes adequate quantity would depend on the circumstances of each case, when it could have, but did not, simply hold, if that is the law, that 10% of the total quantity would be an adequate quantity. All that is required in this case is for the chemist to scoop a few more twigs of the plant material to make up 200 grams of sample which the chemist could then, beyond any reasonable doubt and not mere probability, say that the 200 grams of plant material he examined and analysed was cannabis and thus would trigger the presumption of trafficking. The plant material are available in this case for the chemist to top up the sample from 184 grams to 200 grams but he did not do so. I do not think the Court is asking a lot, but only the best available and beyond reasonable doubt evidence, when it demanded a mere 16 grams more of sample in exchange for a man's life. Knowledge and trafficking are already to be presumed under the law. I see no reason why the evidence for establishing that 200 grams of the plant material was cannabis was established by probative evidence through the examination and chemical testing of a part, not exceeding 200 grams, of the plant material, when

it can be ascertained beyond reasonable doubt by the examination and the conduct of chemical testing on 200 or more grams of the plant material.

It was for the reasons stated that I was of the view that the presumption of trafficking had not arisen because the 200 grams of cannabis had not been established beyond reasonable doubt. I accordingly, on 6 October 1994, amended the charge to one of possession of 184 grams of cannabis, under s. 6 read with s. 39A(2) of the Dangerous Drugs Act, 1952, and called upon the accused to enter upon his defence. The accused pleaded guilty to the amended charge and I sentenced him to life imprisonment and 10 strokes of the whip. I would add that the cannabis and plant materials are to be destroyed after the disposal of any appeal against the decisions herein or after the expiry of the period limited for appeal if there is no appeal. The destruction is to be carried out in the compound of the Court and to be witnessed by the Senior Assistant Registrar of the High Court. The manner of destruction is by burning unless the Department of Environment advises otherwise.